2016 IL App (2d) 130463-U
No. 2-13-0463
Order filed July 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-1487
TEOLIA JORDAN,	)	Honorable Patricia Piper Golden,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Jorgensen specially concurred, joined by Justice Hudson.

ORDER

¶ 1 *Held*: Defendant's postconviction petition raising claim of actual innocence remanded for third-stage postconviction proceedings.

¶ 2 Defendant, Teolia Jordan, appeals from the trial court's second-stage dismissal of his petition and supplemental petition for post-conviction relief brought pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). We vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial at which they were represented by the same private attorney, defendant and his brothers, Steven T. Jordan and Derrick D. Jordan, were each convicted of seven counts of attempt (first degree murder) (720 ILCS 5/8-4(a) (West 2004)); (720 ILCS 5/9-

1(a)(1) (West 2004)) arising out of a June 22, 2004, shooting incident, wherein several men shot at Kalvin Stewart, Gregory Warfield, and others in front of 1134 Kane Street in Aurora.[1] After defendant and his brothers were found guilty, defendant was sentenced to seven concurrent terms of 15 1/2 years in the Department of Corrections.

¶ 5 Defendant and his brothers, again represented by the same attorney (this time, from the Office of the State Appellate Defender), appealed to this court. We affirmed their convictions in a consolidated disposition. See *People v. Jordan*, Nos. 2-06-1147, 2-06-1148, & 2-06-1149 cons. (2009) (unpublished order under Supreme Court Rule 23).

¶ 6 In February 2010, defendant and his brothers, by retained counsel Nicholas Kurran of Kathleen Zellner & Associates, filed a joint two-count petition for post-conviction relief. Count I alleged various instances of ineffective assistance of trial counsel; count II alleged that Steven Jordan was denied his constitutionally protected right to conflict-free representation at trial. In October, the case was continued until January 2011 to schedule second-stage proceedings on the petition.

¶ 7 On January 4, 2011, Kurran filed a motion to withdraw as counsel for Steven and Derrick, alleging that, after the petitions had been filed, "certain conflicts of interest" had developed between the defendants such that counsel "cannot continue to jointly represent" each of the defendants. Counsel stated that he had obtained affidavits from Steven and Derrick to the effect that they were aware of the motion to withdraw, understood the reason for it, and did not object to it. The trial court granted the motion and appointed the public defender to represent Steven and Derrick.

[1] A fourth codefendant was tried separately and, after a bench trial, was found not guilty.

¶ 8 The case was continued several times for defendant to file an amended or supplemental petition. In February 2012, defendant filed a supplemental petition in which he set forth a claim of actual innocence based on newly-discovered evidence. Defendant attached two affidavits, that of Kalvin Stewart, who did not testify at trial but now asserted that defendant was not one of the persons who shot at him, and that of Gregory Warfield, who now recanted his trial testimony that defendant was one of the shooters. The case was continued "for status on location of Trial/Appellate record" and for the State to file a motion to dismiss the petition. The State filed its motion to dismiss in October 2012.

¶ 9 After defendant filed a response, argument on the State's motion to dismiss was held on April 3, 2013. The trial court granted the State's motion and dismissed both the original and the supplemental petitions. This appeal, in which defendant does not address any of the issues contained in his initial postconconviction petition, followed.[2]

¶ 10 II. ANALYSIS

¶ 11 A postconviction proceeding is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial. *People v. Greer*, 212 Ill. 2d 192, 203 (2004). The Act establishes a three-stage process for adjudicating a postconviction petition. At the first stage, the trial court reviews the petition and may summarily dismiss it if the court determines that it is "frivolous or is patently without merit." 725 ILCS 5/122–2.1(a)(2) (West 2010); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Where, as here, the trial court does not summarily dismiss a petition at the first stage, the petition advances to the second stage,

[2] Points not argued in an appellant's brief are waived. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Borello*, 389 Ill. App. 3d 985, 998 (2009). Thus, all issues arising from the trial court's dismissal of defendant's initial petition are waived.

where the State may move to dismiss the petition. See *People v. Rivera*, 2014 IL App (2d) 120884, ¶ 7. When a petition advances to the second stage, the defendant then bears the burden of making a substantial showing of a constitutional violation. *Id.* During second-stage proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Id.* If a substantial showing is made, the petition advances to the third stage for an evidentiary hearing; if it is not made, the petition is dismissed. *Id.* Our review of a trial court's dismissal of a postconviction petition at the second stage is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 12 A. Supplemental Postconviction Petition

¶ 13 1. Trial Evidence

¶ 14 Before analyzing defendant's supplemental petition, we must provide a recap of the evidence at trial. Gregory Warfield testified that he, several family members, and Ronnie Green were outside of his house at 1138 Kane Street when he saw three men, whom he identified as defendant and his brothers Steven and Derrick, rush past his house and start firing handguns at Stewart and the other man, who ran away. Warfield knew the Jordan brothers "[s]ince they were kids" and knew their father for at least 40 years. A fourth man, whom Warfield could not identify, appeared and fired five shots at Warfield and his house, but Warfield was never hit. The Jordans and the fourth man got into a car (that in which the Jordans had originally arrived) and drove away. Warfield identified the Jordans as three of the shooters to the police and subsequently identified them in a photo lineup.

¶ 15 Ronnie Green testified that he saw four men running down the sidewalk; two were shooting at Kalvin Stewart and James Fultz several houses away; one guy "got there late," and the fourth came later and shot at Green and Warfield. In court, Green identified the Jordans as

the shooters and said that the fourth man was not in court that day. When the police arrived, Green told officers that he did not know what happened; however, he later told Officer Douglas Podschweit that the Jordans were three of the shooters. Green initially told police that he did not know at whom the Jordans were shooting, because Stewart and the other man were Green's "associates" and "friends." Green identified "Butt Naked" as the fourth shooter who shot at him.

¶ 16 When Green was shown a photo lineup on June 29, 2004, he told police that he did not recognize anyone because he did not want to get involved. He told Investigator Wayne Biles that the three shooters used "oozies." He denied telling Biles that, when he had originally told Officer Podschweit that the Jordans were the shooters, he was simply repeating what Warfield had told him. He also described the Jordans as his "cousins."

¶ 17 Casey Stewart, who was outside of Warfield's house at about 3 p.m. on June 22, 2004, testified that he twice saw a tan Suburban drive by; he knew that Derrick Jordan had a tan Suburban. About 30 seconds after the Suburban drove by the second time, he heard Green say "look out," and he saw Derrick, alone, come around the corner. He did not remember telling police that there were two other men with Derrick "running behind him on either side." He ran into the house because he thought that there was going to be a shooting. He went straight home after the shooting stopped and did not talk to police until August. In September, he was shown a photo lineup. He recognized photos of Steven Jordan, Michael Jordan, defendant, and a man called "Butt Naked" and told police that he did not see them at the shooting on June 22, 2004. He also picked out a photo of Derrick Jordan and stated that he had seen Derrick at the shooting.

¶ 18 Vivian Warfield, who was mostly deaf, testified through a sign interpreter that she lived in the Warfield home on Kane Street and was in the driveway on June 22, 2004, when she saw four boys dressed in black run by, carrying something by their sides. She felt, more than heard,

gunshots, and she crouched down. She could not identify the shooters, but she heard from her great-niece "right after the shooting" that they were the Jordans. She could not tell police much when they arrived because she needed an interpreter. The next day, police, with no interpreter, showed her photo lineups. Vivian's great-niece, Destiny, who was not a professional interpreter, helped interpret. The officer asked whether Vivian knew anybody in the pictures; she pointed out the Jordans "[b]ecause I knew those people, and that's all," but she could not identify the shooters.

¶ 19 Patsy Harris, who was hearing-impaired, testified that she was at Vivian Warfield's house on the day in question. She saw an SUV drive by twice, then she saw "a couple" of people walk by dressed in sweatpants and hooded sweatshirts. She did not see their faces. The people then began shooting at Kalvin Stewart. Harris hid underneath a car.

¶ 20 In March of 2005, a police officer showed Patsy photo lineups in her home. There was no interpreter present; she read lips. Patsy told the officer that she had not seen the faces of the shooters. She did not recognize any of the photos. She picked out one photo that "could have been" one of the shooters, but she was not sure. The officer kept "pressuring" her to decide if it was or was not one of the shooters; she said that she told him that she never saw their faces and that she could not "say that's the person."

¶ 21 James Fultz testified that he was walking on the sidewalk along Kane Street on the afternoon of June 22, 2004, when shots were fired. Kalvin Stewart was nearby, walking towards a car that had pulled up at the curb. Fultz did not see anyone in the Warfield front yard and could not recall seeing Ronnie Green at the time of the shooting. He did not remember telling the police, later in 2004, that he saw a tan SUV drive by and then saw several men run at Stewart and him. He heard Kalvin say, "There they go" just before shots rang out, and he started to run.

He did not turn to see where the shots came from and did not see who was shooting. He denied telling officers in November 2004 that he saw three male blacks in black clothing with hoods up armed with handguns coming towards them. He denied identifying Derrick Jordan and "Butt Naked" as being in the group with guns. The Jordans were his cousins. Fultz had entered into an agreement with the State. Unrelated charges against him were resolved in exchange for his testimony against Kendrick Elliott; however, he would not testify against his cousins. He was testifying pursuant to a subpoena.

¶ 22 Destiny Anderson testified that she lived at the Warfield home. She was on the porch on June 22, 2004, when two, three, or four people wearing black hoodies "came out of nowhere" and started shooting. When asked if she told officers that day that she "knew the three offenders to be the Jordans," she said, "No. My uncle [Gregory Warfield] said that." She only repeated what she had heard him say.

¶ 23 Officer Podschweit of the Aurora police department testified that he was the first officer to respond to the Warfield home on June 22, 2004. Approximately five people were standing in front of the house speaking with each other when he arrived. Gregory Warfield told him that defendant, Steve Jordan, and Derrick Jordan were involved in the shooting. Warfield was by himself when Podschweit spoke to him, although all of the people, including Green, were in the general area. Green could "[p]ossibly" have been able to hear as Warfield and Podschweit spoke. Green told him the Jordan brothers were three of the shooters, but he did not specify which Jordan brothers; he did not know the fourth shooter. Green was also alone when they spoke. Destiny Anderson told him that there were four shooters and "that she knew the three offenders as the Jordans." All four of the men had guns. She gave no description of the shooters.

¶ 24 Detective Martin Sigsworth of the Aurora police department testified that he met with Vivian Warfield on June 23, 2004. He did not know sign language, but Vivian could read lips, and she had a family member present to assist with sign language. He showed her several photo lineups and asked her to tell him if she "recognized anybody that was—that had shot at her the day before." He told her that she did not have to pick out anybody. In the first array, she pointed to picture number five and said, "[t]hat's Teolia." She pointed to photos in the other arrays, including a picture of Steven Jordan and a picture that Sigsworth did not identify at trial, although she did not name the people in the pictures. She identified no one in one array.

¶ 25 Sigsworth met with Casey Stewart in September 2004. Stewart told Sigsworth that, on June 22, he saw Derrick Jordan with two other people running behind him and on either side. Sigsworth spoke to James Fultz on November 18, 2004. Fultz told him that he saw a beige SUV drive past while he walked with Kalvin Stewart, then saw three male blacks wearing black clothes and hoods; he recognized Derrick Jordan in the lead. Several people, including Ronnie Green, were nearby. He clearly saw Derrick shooting at him and also saw Kendrick Elliott with a gun. Sisworth also met with Patsy Harris on March 16, 2005. He was able to communicate with her, even in the absence of a sign language interpreter, because she could hear with the use of a hearing aid and could read lips. Harris did not identify anyone in the four photo lineups that he showed her. When he showed her one of the lineups again, she picked out the photo of defendant.

¶ 26 Investigator Biles testified that he met with Warfield on June 28, 2004, and showed him several photo lineups. Warfield picked out three photos as "the Jordan boys" but could not give any first names. In one lineup, he said that he saw one of the Jordan boys, but that he had not been involved in the shooting. Biles also showed photo lineups to Green, who picked out photos

and provided names of T.D. Jordan and Derrick Jordan, whom he said had been running down the street shooting on June 22, 2004. He pointed out another Jordan who had been shooting, but did not provide a first name. He also picked out a photo of Michael Jordan, who Green said was not present at the shooting. When asked if he had told officers that the Jordan boys committed the shooting, Green told Biles that he was just repeating what Warfield had told him. According to Biles, Green also said that he knew that "the guys who did the shooting should be in jail, but he can't say they were the Jordans."

¶ 27 Defendant testified that he threw a birthday party for his son on the day of the shooting. He started grilling at about 11:30 a.m. or noon. He did not notice if his brother Steven was at the party, but Steven's daughter was there. He spoke to his ex-girlfriend, Mi-Amber, on the telephone at about 3 p.m.

¶ 28 Defendant also presented four witnesses who testified that they saw him grilling at the party during the course of the day. Mi-Amber Whitehead testified that she called defendant at about 3 p.m. and he said that he was barbequing. She also spoke to him at about 5 or 6 p.m. and she did not notice anything unusual. Neither Steven nor Derrick testified at trial.

¶ 29 2. Actual Innocence Claim

¶ 30 At the second stage of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A third stage hearing is warranted only where the allegations in the petition, supported where appropriate by the trial record or accompanying affidavits, makes a substantial showing that a defendant's constitutional rights have been violated. *People v. Orange*, 195 Ill. 2d 437, 448 (2001). All well-pleaded facts in the petition and in accompanying affidavits are taken as true. *Id.* Where, as here, the trial court dismisses the petition at the second stage, we

generally review the trial court's decision using a *de novo* standard. *Pendleton*, 223 Ill. 2d at 473. This means that we perform the same analysis that the trial judge would have performed, if we had been sitting during the second-stage dismissal hearing. *People v. Minniefield*, 2014 IL App (1st) 130535, ¶ 58.

¶ 31 Defendant contends that he raised a substantial constitutional claim of actual innocence based on newly-discovered evidence. Our supreme court has held that the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly-discovered evidence. See *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). The evidence in support of such a claim must be: (1) newly discovered; (2) material, not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Id*. at 333.

¶ 32 "Newly-discovered evidence" is defined as evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence. *Id*. at 334. "Evidence is considered cumulative when it adds nothing to what was already before the jury." *Id*. at 335.

¶ 33 Here, defendant attached affidavits of Gregory Warfield and Kalvin Stewart to support his claim. In his affidavit, Warfield stated that he testified at defendant's trial that he was standing outside 1138 Kane Street in Aurora on June 22, 2004, when he saw three individuals get out of a truck and chase after Kalvin Stewart and James Fultz, shooting at them. A fourth individual later shot at Warfield's house. Warfield "assumed" that defendant, whom he knew, was at the scene because he knew that defendant's brothers were the shooters, and he "associated them" with defendant. Warfield knew that he was "mistaken" when he identified defendant as one of the shooters because he did not see defendant at the scene. He reiterated that defendant

"was not present at the scene at the time of the shooting" and stated that he was "confident that [defendant] is innocent of the crime for which he was convicted."

¶ 34 In his affidavit, Kalvin Stewart stated that he was standing outside near 1138 Kane Street with James Fultz on June 22, 2004, when he saw four individuals moving in his direction. He could see their faces clearly. Those individuals shot at Fultz and Stewart from about a quarter of a block away. Stewart had known defendant for 18 years, and he was "certain that [defendant] was not one of the individuals" who shot at him. Stewart avoided speaking with police or other investigators because he did not want to get involved. He was never contacted by police or the State's Attorney's office and was never subpoenaed to testify. He also stated, "If any defense attorney or investigator had attempted to contact me[,] I would not have discussed what I saw or agreed to testify."

¶ 35 a. Newly-Discovered Evidence

¶ 36 At oral argument, the State conceded that Warfield's affidavit qualified as newly-discovered evidence. However, the State argues that Stewart's affidavit is not newly discovered. The State notes that it had disclosed Kalvin Stewart as a possible witness twice: in its answer to discovery filed in September 2004 and in its list of witnesses filed May 11, 2005, several weeks before trial. According to the State, the evidence proffered in Stewart's affidavit was available at the time of trial and could have been discovered through due diligence on defendant's part, and it is not newly discovered.

¶ 37 Defendant does not dispute that Stewart's existence was known before trial. However, he argues that the question of whether evidence is newly discovered is not a matter of when the subject of the testimony occurred, "but rather when the testimony became available to the petitioner."

¶ 38 Defendant points to the testimony of Robert Lichtfuss, a private investigator hired to do some investigatory work on behalf of the Jordans, who testified at a hearing on defendant's post-trial motion. Lichtfuss testified that he spoke to Kendrick Elliot in an attempt to get an address for Latoya Wilson, who "had information about payments made to Warfield and Stewart." Lichtfuss obtained Wilson's address and went to her house on three occasions without being able to speak to her. On the third attempt, an unnamed man, who turned out to be Wilson's nephew, came out and told Lichtfuss that Wilson was not there. Lichtfuss asked him if he knew Kalvin Stewart, and he replied that he had never heard of him. According to Lichtfuss, the porch door opened and another man yelled at the nephew "to come on into the house and don't have anything to do with that MF, and then he yelled at me again and he says, 'Don't you ever come back here again or else.' " The nephew told Lichtfuss that the other man was Kalvin Stewart.

¶ 39 Defendant argues that Stewart's unwillingness to cooperate, demonstrated in his interaction with Lichtfuss and his attestations in his affidavit, are sufficient to show that Stewart's testimony could not have been discovered sooner through due diligence. The State disagrees, arguing that, despite Stewart's alleged uncooperative attitude, defendant could have subpoenaed him for pretrial purposes, and nothing in Stewart's affidavit suggests that he would not have shown up in court had he been subpoenaed. Thus, defendant did not exercise due diligence.

¶ 40 We agree with defendant. Stewart's testimony that defendant was not one of the individuals who shot at him was clearly discovered after trial, and it could not have been discovered sooner through due diligence. We note that, while Stewart was listed as a potential witness in two State filings, in neither filing was any address, other than "Aurora, Il," provided. Defendant attempted to find Stewart's address and, apparently inadvertently, Lichtfuss found

him at Latoya Wilson's home. Stewart yelled at and threatened Lichtfuss. He later provided in his affidavit that, "If any defense attorney or investigator had attempted to contact me[,] I would not have discussed what I saw or agreed to testify." Due diligence requires some effort. See *People v. Battles*, 311 Ill. App. 3d 991, 997 (2000) ("A total absence of effort shows a lack of due diligence.") At the same time, caselaw does not require a defendant to undertake apparently futile acts. See *People v. Molstad*, 101 Ill. 2d 128, 135 (1984) ("no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination.") Whether due diligence has been exercised is a question to be determined on a case-by-case basis after careful review of the particular circumstances presented. *Battles*, 311 Ill. App. 3d at 997. Here, defendant sought Stewart, accidently found him, and was rebuffed by him. Stewart's affidavit shows that any further attempts at contact would have been similarly rebuffed. A defendant need not exhaust every avenue to show due diligence, and we find that defendant here did exercise due diligence such that Stewart's affidavit should be considered as newly-discovered evidence.

¶ 41 b. Non-Cumulative

¶ 42 At oral argument, the State, citing to *Ortiz*, 235 Ill. 2d 319, conceded that the evidence in the affidavits was non-cumulative. We agree, and we need not address this factor further.

¶ 43 c. Conclusive Character

¶ 44 The evidence in support of a claim of actual innocence must be of such conclusive character that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333. We find that the Stewart and Warfield affidavits, when viewed with the evidence produced at trial, are of such character that they could produce a not guilty verdict on retrial. The evidence against

defendant at trial, while sufficient to support a guilty verdict, was not, as the State argues, "overwhelming."

¶ 45 We first note that the State argues that, as a complete recantation, Warfield's affidavit is inherently unreliable and should not lead to a retrial absent extraordinary circumstances, which are not present here. See, *i.e.*, *People v. Morgan*, 212 Ill. 2d 148, 155 (2006). However, such a reliability argument is premature at this stage of the proceedings. By filing a motion to dismiss, rather than an answer to the instant petition, the State has neither refuted nor denied the allegations in the petition and affidavits, and the Act contemplates that factual and credibility determinations are to be made at third-stage evidentiary proceedings. See *People v. Harper*, 2013 IL App (1st) 102181, ¶ 51. Therefore, the reliability of Warfield's affidavit should not be determined at this stage of the proceeding.

¶ 46 Defendant testified that he was home at his son's birthday party at the time of the shootings. His alibi was supported by the testimony of five others who either saw him at home or spoke to him on the phone at that time. The affidavits add eyewitness evidence from two of the victims of the crime that clearly supports defendant's alibi that he was not at the scene of the shooting, with Warfield stating that defendant "was not present at the scene at the time of the shooting" and Stewart stating that he was "certain that [defendant] was not one of the individuals" who shot at him.

¶ 47 Further, by recanting his testimony, Warfield left Green as the only eyewitness to implicate defendant as one of the shooters. Casey Stewart identified only Derrick Jordan as a shooter. Vivian Warfield testified that she had heard that the Jordans were the shooters and picked them out of the lineups because she knew them. Destiny Anderson testified that she only repeated what Warfield had said and did not know the Jordans to be the shooters. Patsy Harris

told police that she had not seen the faces of the shooters and did not recognize any of the photos in the lineups. James Fultz, another victim, never identified defendant as a shooter.

¶ 48 The State argues that the testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict. See *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶ 29. However, even Green's evidence was of questionable reliability. While Green testified that the Jordans were three of the shooters, Officer Podschweit testified that Green never specified to him which Jordan brothers. Officer Biles testified that Green told him that he was just repeating what Warfield said regarding the Jordans and that Green also said that he knew that "the guys who did the shooting should be in jail, but he can't say they were the Jordans."

¶ 49 Given the supportive nature of the affidavits in regard to defendant's alibi and the reduction of the already slim evidence placing defendant at the scene of the shootings, we find that the affidavits are of such conclusive character that they would probably change the result on retrial. Thus, we conclude that the trial court erred in granting the State's motion to dismiss defendant's supplemental petition. Therefore, we must vacate the trial court's judgment of dismissal as it pertains to the supplemental petition and remand the cause for a third-stage evidentiary hearing on that petition.

¶ 50 B. Supreme Court Rule 651(c)

¶ 51 Defendant also contends that the record of postconviction proceedings does not demonstrate compliance with Supreme Court Rule 651(c) (eff. Feb. 6, 2013) and, therefore, *if we were not remanding for a third-stage evidentiary hearing*, this cause must, alternatively, be remanded for compliance with Rule 651(c). While we are not required to address this issue, in light of our remand for a third-stage hearing, we find instructive the following statement regarding *dicta*:

> "Our analysis on this issue is *dicta*. Every decision contains *dicta*; it is inherent in the appellate process. Taking the opportunity to explore an issue involving a question that our colleagues in the Second District decided, while not affecting the outcome here, may be useful in future cases." *In re Marriage of Solomon*, 2015 IL App (1st) 133048 ¶ 23.

Thus, we will address defendant's claim involving Rule 651(c).

¶ 52 A defendant has no constitutional right to assistance of counsel at a postconviction proceeding. *People v. Williams*, 186 Ill.2d 55, 60 (1999). Because the source of the right to counsel in postconviction proceedings is statutory, postconviction defendants are entitled only to the level of assistance provided by the Act. *Perkins*, 229 Ill. 2d at 42. The Act requires only a reasonable level of assistance. *Perkins*, 229 Ill. 2d at 42. To assure this reasonable assistance required by the Act, Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes specific duties on postconviction counsel; under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The purpose of Rule 651(c) is "to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *Perkins*, 229 Ill. 2d at 44. To that end, the rule requires that the record of the postconviction proceedings show that counsel fulfilled these duties, thereby taking "the necessary steps to secure adequate representation of petitioner's claims." *People v. Szabo*, 144 Ill. 2d 525, 532 (1991). This showing "may be made by the certificate of petitioner's attorney." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 53 Defendant contends that the record here "is devoid of both possible means of compliance with the rule"; counsel did not file a certificate, and the record of postconviction proceedings

does not demonstrate the required compliance. Thus, according to defendant, this cause must be remanded for compliance with Rule 651(c). See, *e.g.*, *Suarez*, 224 Ill. 2d at 47 ("This court has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.").

¶ 54 The Act provides both that counsel may be appointed for the defendant at the second stage if the defendant is indigent and that a petition may be amended or withdrawn. 725 ILCS 5/122–4, 122-5 (West 2010). The reasoning behind the inclusion of these provisions has been explained by our supreme court:

> "These provisions were included because it was anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who had not had the aid of counsel in their preparation. To the end that the complaints of a prisoner with respect to the validity of his conviction might be adequately presented, the statute contemplated that the attorney appointed to represent an indigent petitioner would consult with him either by mail or in person, ascertain his alleged grievances, examine the record of the proceedings at the trial and then amend the petition that had been filed *pro se*, so that it would adequately present the prisoner's constitutional contentions. The statute can not perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court." *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968).

These same considerations were addressed by the supreme court in the requirements of Rule 651(c):

> "Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

Rule 651 was amended in 1969, adding the last line of section (c) "to implement the decisions of the court [including *Slaughter*] with respect to the responsibilities of an attorney representing an indigent prisoner in a post-conviction proceeding." Ill. S. Ct. R. 651 Committee Comments (Revised November 30, 1984).

¶ 55 The concerns enunciated in *Slaughter* (and its progeny) and the language of Rule 651(c) itself would appear to limit the application of the rule to post-conviction counsel appointed after a *pro se* petition has survived to the second stage of postconviction proceedings. However, in *People v. Richmond*, 188 Ill. 2d 376 (1999), our supreme court extended the reach of Rule 651(c) to include paid counsel retained by a defendant after a petition reached the second stage of postconviction proceedings. The *Richmond* court said:

> "Although *Slaughter* refers to 'appointed counsel' in describing the duties of a lawyer representing a defendant who filed a *pro se* post-conviction petition—counsel in

> that case was appointed rather than retained—we believe that the same concerns mentioned by the court are relevant here, when a defendant who files a *pro se* post-conviction petition is later represented by retained counsel. No less than appointed counsel, retained counsel should have the same duties in these circumstances to consult with the defendant, to examine the record of the trial proceedings, and to make any necessary amendments to the original, *pro se* petition." *Richmond*, 188 Ill. 2d at 381-82.

The court explained that the text of Rule 651(c):

> "does not distinguish between appointed and retained counsel, or purport to limit its scope to defendants filing *pro se* post-conviction petitions who are later represented by appointed counsel. Rather, *the rule speaks broadly of the duties imposed on 'petitioner's attorney,' without suggesting that the duties of appointed counsel are in any sense different from those of retained counsel*." (Emphasis added.) *Id* at 380-81.

¶ 56 The ultimate aim of both the Act and Rule 651(c) is the adequate presentation of the defendant's claims. See *Slaughter*, 39 Ill. 2d at 285 ("To the end that the complaints of a prisoner with respect to the validity of his conviction might be *adequately presented*"; "so that it would *adequately present* the prisoner's constitutional contentions" (emphases added.)); Ill. S. Ct. R. 651 (c) (eff. Feb. 6, 2013) ("an adequate presentation of petitioner's contentions.")). According to our supreme court, the Act "can not perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court." *Slaughter*, 39 Ill. 2d at 285. To achieve that aim, counsel must consult with the defendant, examine the trial record, and make to the *pro se* petition any amendments that are necessary for an adequate presentation of defendant's contentions.

¶ 57 However, consultation, examination, and amendment (when necessary) are tools to ensure adequate presentation; they are not ends unto themselves. No less than appointed counsel or later-retained counsel, an attorney hired to file an initial post-conviction petition should have the same duties in these circumstances to consult with the defendant and to examine the record of the trial proceedings. The fact that such counsel would not be required to make any necessary amendments to an original, *pro se* petition should not remove counsel from the strictures of the rule. Again, amendment, if necessary, of an original *pro se* petition is a tool to achieve adequate presentation of the defendant's claims. While that tool would not be necessary where counsel draws up and files the initial petition, that tool does not define the application of the rule.

¶ 58 At first glance, the *Richmond* decision would seem to support the State's argument that Rule 651(c) does not apply where retained counsel files the initial postconviction petition. In *Richmond*, the supreme court concluded that "Rule 651(c) is applicable in these circumstances, when a defendant who files a *pro se* post-conviction petition is later represented by retained counsel in the post-conviction proceedings." *Richmond*, 188 Ill. 2d at 381. The court distinguished two appellate court cases[3] that "suggested that Rule 651(c) does not apply to retained counsel" by stating:

> "In neither case, however, was the initial post-conviction petition filed *pro se*; rather, in both cases the initial petition was prepared and filed by counsel. By its own terms, then, the requirements of Rule 651(c) would not have been applicable in those settings." *Id* at 383.

3. *People v. Zambrano*, 266 Ill. App.3d 856, 867, (1994), *vacated in part on other grounds*, 159 Ill. 2d 579 (1995); *People v. Doggett*, 255 Ill. App. 3d 180, 187 (1993).

Indeed, this court found "no way to interpret the [*Richmond*] court's words as meaning other than that Rule 651(c) is inapplicable in proceedings where counsel filed the petition." *People v. Bennett*, 394 Ill. App. 3d 350, 354 (2009). The State here (and the special concurrence) relies on *Bennett* (and, by implication, *Richmond*) to argue that Rule 651(c) is inapplicable in this case. *Bennett* presumed that the *Richmond* court "deemed that the contractual terms of a private representation that produces a postconviction petition would provide an adequate substitute for Rule 651(c)'s explicit imposition of other duties." *Id*. The *Bennett* court was concerned about the implication of such reasoning, noting that that when "counsel drafts a petition as an incident to his or her representation of the petitioner in the original proceeding, the terms of representation provide little assurance that the petitioner will get a full chance to present all of his or her claims." *Id*. However, while *Bennett*'s concern was proper, its presumption was faulty. The later-retained counsel in *Richmond* was under the same type of "contractual terms of a private representation" as counsel who files an initial postconviction petition, yet the *Richmond* court brought such counsel under the application of Rule 651(c). *Richmond* clearly found such contractual terms inadequate and extended the coverage of the rule. *Bennett* misread *Richmond* and, thus, misapplied it.

¶ 59 A close reading of *Richmond* is revealing. We first note that *Richmond* did not involve counsel drafting the original petition.[4] The court was asked to "impose on retained counsel***the same requirements that we impose on appointed counsel representing a defendant who originally files a *pro se* post-conviction petition." *Richmond*, 188 Ill. 2d at 381. *Richmond* was not the proper case to consider, let alone impose, such a requirement as we consider here

[4] *Richmond* distinguished *Zambrano* and *Doggett* because both cases involved initial petitions drafted and filed by counsel. See *Richmond*, 188 Ill. 2d at 383.

today, and the court did not make a definitive statement on the matter, let alone a negative decision on the matter.

¶ 60 *Richmond*'s brief foray into the applicability of Rule 651(c) to factual situations not then before the court was not required for either the logical analysis of the merits of the appeal (the *ratio decidendi*) or the holding (the *decisis*) and was, thus, *obiter dicta*. See *People v. Hodges*, 2011 IL App (2d) 110165, ¶ 8 (McLaren, J., dissenting). *Obiter dicta* is a remark or an opinion that is uttered by a court as an aside (*LeBron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236 (2010)) and "as a general rule is not binding as authority or precedent within the *stare decisis* rule." *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). Judicial *dictum* (an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court) is entitled to much weight, and should be followed unless found to be erroneous. *Id*. However, the *Richmond* court was not tasked with determining whether Rule 651(c) applied when counsel filed the initial postconviction petition; its one-sentence comment on the impossibility of such an application, with no analysis, is hardly *obiter dicta*, let alone authoritative and binding.

¶ 61 *Obiter dictum* of a court of last resort can be tantamount to a decision (and therefore binding) in the absence of a contrary decision of that court. *Cates*, 156 Ill. 2d at 80. However, the supreme court itself demonstrated the lack of weight that *Richmond* should be accorded on the issue of the applicability of Rule 651(c) in this situation a mere two months after it issued *Richmond*, when it issued *People v. Mitchell*, 189 Ill. 2d 312 (2000), which is more factually on point with the case before us and, thus, a more relevant statement of applicable law. In *Mitchell*, counsel filed the initial postconviction petition (*Id* at 357) and, later, two amended petitions. The trial court granted the State's second-stage motion to dismiss. Before the supreme court, the defendant contended that counsel did not meet the requirements of Rule 651(c):

> "Defendant contends that his attorneys did not meet their obligations under Rule 651(c). The State counters that Rule 651(c) applies only to defendants who file *pro se* petitions and does not apply when the original petition is filed by an attorney. Here, the provision of Rule 651(c) that defendant claims was not complied with was the one requiring the petitioner's claims to be shaped into appropriate legal form. The clause defendant refers to is the one requiring counsel to affirm that he 'has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.' 134 Ill. 2d R. 651(c). As defendant did not file a *pro se* petition, his attorneys could not have violated that provision. Moreover, we find that petitioner's claims are in appropriate legal form." *Id* at 358.

¶ 62 The court did not say that it agreed with the State that the Rule 651(c) requirements did not apply because counsel filed the initial petition. Instead, the court stated merely that counsel could not have violated the Rule 651(c) requirement of amending the *pro se* petition *because there was no pro se petition*! The court related a *counterfactual conditional* rather than a broad exception to the rule with regard to retained counsel; in other words, the factual basis for the claim of error was counter to the facts of record.

¶ 63 The court did not say that counsel could not have violated the entirety of Rule 651(c). This is all the more obvious because the court noted, in the sentence before the above quote, that "[t]he State counters that Rule 651(c) applies only to defendants who file *pro se* petitions and does not apply when the original petition is filed by an attorney." *Id*. If such were the case, the court could have simply agreed with that contention, but it did not. It specifically addressed the single provision of the Rule upon which the defendant based his argument and concluded that, "[a]s defendant did not file a *pro se* petition, his attorneys could not have violated that

provision." *Id.* The special concurrence takes this quote out of context to imply that the "provision" that the supreme court found could not have been violated was Rule 651(c). *Infra* ¶ 76. The special concurrence is wrong, and its implication is not well-founded. The "provision" clearly was "*the provision of Rule 651(c)****requiring the petitioner's claims to be shaped into appropriate legal form. The clause defendant refers to is the one requiring counsel to affirm that he 'has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.' " (Emphasis added.) *Mitchell*, 189 Ill. 2d at 358. The court did not address the other provisions of Rule 651(c), let alone hold that counsel could not have violated the other provisions of the Rule, such as examining the record of the proceedings at the trial. Tellingly, the court did not even reference to *Richmond* in its analysis.

¶ 64 Further proof that any reliance on *Richmond*'s single line of *dicta* is misplaced is provided by *People v. Owens*, 139 Ill. 2d 351 (1990), decided nine years before *Richmond*. In *Owens*, the petitioner, "through retained counsel," filed a postconviction petition. *Id* at 356. Eventually, retained counsel withdrew, and the public defender was appointed and filed an amended petition. *Id.* After dealing with issues not relevant here, the supreme court addressed the defendant's claim that appointed counsel failed to comply with Rule 651(c). *Id* at 367-68. As the court concluded:

> "The record clearly shows that petitioner's counsel complied, insofar as compliance was possible, with Rule 651(c). The record shows that counsel consulted with the petitioner and filed an amended post-conviction petition which raised numerous allegations of trial error. It would have been impossible for counsel to have raised many of these errors without having examined the record of the proceedings at trial." *Id.*

Thus, Rule 651(c) was applied where retained counsel filed the initial postconviction petition. *Owens* has never been overruled, and the special concurrence's silence on this case is mystifying.

¶ 65 Reading *Owens*, *Richmond* and *Mitchell* together, one must conclude that Rule 651(c) applies to all counsel involved with a second-stage petition under the Act. In extending the application of Rule 651(c) in *Richmond*, the supreme court obliterated the distinction between appointed and retained counsel, noting:

> "the text of the rule does not distinguish between appointed and retained counsel, or purport to limit its scope to defendants filing *pro se* post-conviction petitions who are later represented by appointed counsel. Rather, the rule speaks broadly of the duties imposed on 'petitioner's attorney,' without suggesting that the duties of appointed counsel are in any sense different from those of retained counsel." *Richmond*, 188 Ill. 2d at 380-81.

Again, the ultimate aim of the Act and Rule 651(c) is "adequate presentation." No less than appointed counsel or later-retained counsel, an attorney hired to file an initial post-conviction petition should have the same duties in these circumstances to consult with the defendant and to examine the record of the trial proceedings. The fact that such counsel would not be required to make any necessary amendments to an original, *pro se* petition should not remove from counsel the obligation to consult with his client and examine the trial record. Again, amendment, if necessary, of an original *pro se* petition is a tool to achieve adequate presentation of the defendant's claims. While that tool would not be necessary where counsel drafts and files the initial petition, that single tool does not define or limit the ultimate aim of the rule.

¶ 66 This makes the supreme court's recent citation to *Richmond* in *People v. Cotto*, 2016 IL 119006, all the more confounding. In *Cotto*, the defendant, through privately retained counsel,

filed a postconviction petition that was ultimately dismissed by the trial court at the second stage of proceedings. The defendant appealed, arguing that his privately retained counsel did not provide him with the requisite "reasonable level of assistance" during the second-stage proceedings. *Id* ¶ 15. The appellate court affirmed the dismissal, concluding that, while a *pro se* defendant had a right to reasonable assistance from appointed counsel, the State was not required to provide reasonable assistance of counsel to a defendant able to hire his own postconviction counsel. *Id* ¶ 16. The supreme court disagreed, stating:

> "We hold that there is no difference between appointed and privately retained counsel in applying the reasonable level of assistance standard to postconviction proceedings. Both retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings." *Id* ¶ 42.

However, the court cited to *Richmond* to support its statement that "Rule 651(c) applies only to a postconviction petition initially filed by a pro se defendant." *Id* ¶ 41. This reliance on one sentence of *obiter dictum* from *Richmond* perpetuates an unneeded dichotomy and creates a new remedy for a non-existent problem. The supreme court reasoned that "Rule 651(c) 'is merely a vehicle for ensuring a reasonable level of assistance' ([*People v.]Anguiano*, 2013 IL App (1st) 113458, ¶ 37) and should not be viewed as the only guarantee of reasonable assistance in postconviction proceedings." *Cotto*, 2016 IL 119006, ¶ 41. Rule 651(c) provided for an attorney's certification or a showing in the record as guarantees of reasonable assistance. It is unclear what vehicles outside of the certification and a showing in the record can guarantee reasonable assistance. In *Cotto*, wherein no attorney certificate was filed, the court looked to the record to make this determination: "After considering the record in this case, we reject defendant's argument that his postconviction counsel failed to provide reasonable assistance." *Id*

¶ 51. How is this any different from looking at the record pursuant to Rule 651(c)? At least Rule 651(c) provides specific criteria to look for in the record: whether counsel consulted with the petitioner to ascertain his contentions, examined the record of the proceedings at trial, and made any necessary amendments to the petition such that it makes "an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651 (c) (eff. Feb. 6, 2013). In *Cotto*, the court emphasized the petition filed, especially its size:

> "Here, defendant's retained postconviction counsel drafted a petition with several detailed claims of ineffective assistance by trial counsel, claims of ineffective assistance by appellate counsel, and claims alleging a violation of defendant's due process rights. The petition included several supporting attachments, including: (1) affidavits from defendant, his brother, and his mother; (2) more than 100 pages of transcripts from the trial, pretrial hearings, and posttrial hearings; and (3) a copy of an envelope from defendant's counsel addressed to defendant's mother, postmarked September 4, 2009." *Cotto*, 2016 IL 119006, ¶ 46.

¶ 67 But does this really tell us anything? Are we to look at the size of the petition for proof of "an adequate presentation of petitioner's contentions?" If size is an adequate indicator, what about weight? What if the record shows the following:

> "Good morning, Your Honor. I am attorney J. K. and I represent the defendant, Teolia Jordan. I have had no contact with Teolia, as he is in prison. I drafted the initial really big postconviction petition, with lots of attachments, after consulting with Teolia's mother, who paid me and told me what Teolia said he wanted. I understand that if Teolia has anything he wants to convey to me, his mother will pass it along."

Which metric is the court to employ to insure that counsel provided reasonable assistance? Which is the better metric to demonstrate "an adequate presentation of petitioner's contentions"? Can a privately-retained attorney file an initial postconviction petition and later also file a certificate pursuant to Rule 651(c)? Since, apparently, Rule 651(c) does not apply to that attorney pursuant to *Cotto*,, a certification is immaterial, improper, and frivolous, and must not be allowed. We can only look to the record to find reasonable assistance; we do not care about "an adequate presentation of petitioner's contentions" pursuant to the rule.

¶ 68 We cannot see how the Act can function unless second-stage counsel ascertains the basis of his client's complaints, shapes those complaints into appropriate legal form and presents them to the court. See *Slaughter*, 39 Ill. 2d at 285. There is no logical reason to exclude counsel retained to draft and file an initial postconviction petition from the applicable strictures of Rule 651(c) if we are to assure the adequate presentation of the defendant's claims.

¶ 69 Occam's razor[5], translated as "plurality should not be posited without necessity," is popularly interpreted to mean, "the simpler the explanation, the better." See *In re Paul F.*, 408 Ill. App. 3d 862, 867-68. The simpler solution here is to apply Rule 651(c) to all second- or third-stage postconvition attorneys, no matter who drafted the initial petition. The supreme court moved in this direction when it expanded the Rule's coverage in *Richmond*, and it took another step in this direction in *Cotto* by reviewing the record to find reasonable assistance, consistent with Rule 651(c). However, this progress was obfuscated by citing to the *Richmond dicta* that denies what the court actually did. Perhaps the Supreme Court Rules Committee will take notice and act.

¶ 70 III. CONCLUSION

[5] "*Pluralitas non est ponenda sine necessitate*."

¶ 71 For these reasons, the judgment of the circuit court of Kane County is vacated as it relates to defendant's supplemental petition, and the cause is remanded for a third-stage evidentiary hearing on defendant's supplemental petition.

¶ 72 Vacated and remanded as to defendant's supplemental petition.

¶ 73 JUSTICE JORGENSEN, specially concurring, joined by JUSTICE HUDSON.

¶ 74 I agree with the ultimate outcome here; to reverse the second-stage dismissal of the petition and to remand for a third-stage evidentiary hearing. I write separately, however, to depart from the majority's analysis of Rule 651(c)'s application.

¶ 75 First, we need not reach this issue. As the majority notes, defendant contends that, *if we were not remanding for a third-stage evidentiary hearing*, this cause must, alternatively, be remanded for compliance with Rule 651(c). As explained above, we are remanding for third-stage evidentiary proceedings and, therefore, have no need to even address defendant's alternative argument.

¶ 76 Second, I disagree that Rule 651(c) would apply here. The majority correctly outlines the genesis and purpose of Rule 651(c); the rule ensures that *pro se* defendants, when presenting their claims at second-stage proceedings, receive proper representation. However, I disagree that the rule applies when the postconviction proceedings are not commenced *pro se*, *i.e.*, when *counsel* files the initial petition. Specifically, after a postconviction petition has advanced from first-stage proceedings, the Act provides that postconviction defendants are entitled to a reasonable level of assistance, regardless of whether counsel is appointed or retained. *Perkins*, 229 Ill. 2d at 42; *People v. Cotto*, 2016 IL 119006, ¶ 42. However, our supreme court has not expanded the mandates of Rule 651(c) to cover petitions that were initially filed by counsel. Indeed, as recently as May 2016, when presented with an opportunity to expand or clarify Rule

651(c)'s scope, the court instead followed prior decisions stating that, although it is one vehicle for assuring reasonable assistance, "Rule 651(c) applies only to a postconviction petition initially filed by a *pro se* defendant[.]" *Cotto*, 2016 IL 119006, ¶ 41; see also *People v. Mitchell*, 189 Ill. 2d 312, 358 (2000) (counsel filed the initial postconviction petition and two amended petitions; the court addressed the applicability of Rule 651(c) and noted "As defendant did not file a *pro se* petition, his attorney could not have violated that provision"); *People v. Richmond*, 188 Ill. 2d 376, 380-83 (1999) (where *pro se* postconviction was filed, Rule 651(c) applies to subsequent representation, whether by retained or appointed counsel; the court further contrasted the case with situations where, "the initial post-conviction petition [was not] filed *pro se*; rather, in both cases the initial petition was prepared and filed by counsel. By its own terms, then, the requirements of Rule 651(c) would not have been applicable in those settings."); *People v. Bennett*, 394 Ill. App. 3d 350, 354 (2009) (finding "no way to interpret the [*Richmond*] court's words as meaning other than that Rule 651(c) is inapplicable in proceedings where counsel filed the petition.").

¶ 77 The majority finds *Cotto*'s statement and citation to *Richmond* "confounding," (*supra*, ¶ 65), but it is my opinion that until or unless the court or its Rules Committee says otherwise, it remains that the mandates of Rule 651(c) do not apply when counsel files the initial petition. Here, defendant did not file his initial petition *pro se* and, accordingly, Rule 651(c) would not apply, were we to address the issue.

¶ 78 JUSTICE HUDSON joins in this special concurrence.